

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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| In the Matter of                             | ) | File No. EB-00-IH-0401     |
|  | ) |                            |
| Emmis Radio License Corporation <sup>1</sup> | ) | NAL/Acct. No. 200132080029 |
|  | ) | FRN: 0001-5293-87          |
| Licensee of Station WKQX(FM),                | ) | Facility ID #19525         |
| Chicago, Illinois                            | ) |                            |

**MEMORANDUM OPINION AND ORDER**

**Adopted:** September 26, 2002

**Released:** September 27, 2002

By the Chief, Enforcement Bureau:

1. In this Memorandum Opinion and Order (“Order”), we deny the petition for reconsideration filed on February 7, 2002 by Emmis Radio License Corporation (“Emmis”). Emmis seeks reconsideration of *Emmis FM License Corp. of Chicago*, 17 FCC Rcd 493 (Enf. Bur. 2002) (“*Forfeiture Order*”), which imposed a forfeiture of \$14,000 on Emmis, licensee of Station WKQX(FM), Chicago, Illinois, for willful and repeated violations of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

2. In the *Forfeiture Order*, we determined that uncontradicted information provided by a complainant established that Emmis broadcast indecent material on two occasions. In making this finding we found that “the excerpts are significant enough, when viewed in combination with the descriptions provided by the complainant and the lack of contradiction by Emmis,<sup>2</sup> to be consistent with our practice.” *Forfeiture Order* at 496 ¶ 12. We also observed that “the complainant provided the dates and times of the broadcast, the call sign of the station, and sufficient detail and context about what was broadcast to determine that Emmis broadcast prohibited indecent material.” *Id.*

3. In its petition, Emmis raises three principal arguments. First, it contends that the record was so inadequate that our reliance thereon was unsupported by precedent and resulted in a violation of the First Amendment. Second, Emmis claims the *Forfeiture Order* violated the Administrative Procedure Act by shifting the burden of proof from the complainant to Emmis. Finally, Emmis submits that the Bureau exceeded its delegated authority because the matters raised cannot be resolved under existing precedent.

4. In the *Forfeiture Order*, we thoroughly considered and rejected Emmis’s arguments about the adequacy of the record. In particular, we noted that, although the complaints did not

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<sup>1</sup> Emmis Radio License Corporation is the current licensee of WKQX(FM) and the successor-in-interest to Emmis FM License Corp. of Chicago. See File No. BALH-20001121ADF.

<sup>2</sup> In responding both to a letter of inquiry and to the *Notice of Apparent Liability*, 16 FCC Rcd 7829 (Enf. Bur. 2001), Emmis could neither confirm nor deny that the broadcasts occurred as alleged by the complainant.

include a tape or transcript, they contained sufficient information to allow us to conclude that the station had repeatedly broadcast indecent material. While the two complaints quoted few of the exact words used in the broadcasts at issue, the complaints clearly alleged that the station aired descriptions of specific sexual activities, namely “fisting” and fellatio. After considering the context of the material, we concluded that the excerpts referenced in complainant’s letters provided were “significant enough” to be consistent with the Commission’s policy of considering complaints supported by significant excerpt or full or partial tape or transcript. *See See Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8015 ¶ 24 (2001) (“*Indecency Policy Statement*”). Moreover, as explained in the *Forfeiture Order*, we could further draw from the complainant’s allegations that the descriptions aired were explicit, that the material dwelled on or repeated the descriptions of the sexual activities, and that the material appeared to pander or was used to titillate. Thus, the material was patently offensive as measured by contemporary community standards for the broadcast medium and therefore indecent. *See Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10. Absent any contrary evidence from Emmis, we determined that the record was adequate enough for us to determine that the station willfully and repeatedly aired indecent material.

5. We therefore disagree with Emmis that the complaints should have been dismissed because they were not supported by a tape, transcript or significant excerpt. As discussed in the *Forfeiture Order* and above, each complaint contained enough information to allow us to find a “significant excerpt.” Moreover, Emmis’s argument that the First Amendment requires more than a “blanket acceptance” of the complainant’s allegations that the broadcasts were indecent and contained graphic detail is inapt. Emmis did not deny that WKQX(FM) broadcast the material described by the complainant, nor did it supply any information to suggest that the material aired differed in any way from that alleged by the complainant. Rather, Emmis merely demurred, arguing that the complainant did not provide enough information for us to conclude that the station broadcast indecent material – a contention with which we disagreed and continue to disagree. As the *Forfeiture Order*’s discussion at paragraphs 8, 10 and 11 clearly reflects, we considered not only the word or words allegedly used but also who said them, the subject matter of the conversations and, in the case of the May 15, 2000, interviews, the accompanying sound effects. In this regard, Emmis’s assertion that the *Forfeiture Order* conclusively relied on the presence of a porn star in finding liability for the March 20, 2000, broadcast is unavailing and simply wrong. In the instant case as well as in each of the pertinent cases cited in the *Forfeiture Order*,<sup>3</sup> the presence of porn stars was not determinative that indecent material aired but merely informed our judgment as to whether the material broadcast appeared to pander or was used to titillate. In sum, Emmis provided no evidence whatsoever. The only evidence before us was that provided by the complainant. Only after thoroughly considering that evidence did we conclude that the material allegedly broadcast was indecent.

6. Likewise, we conclude that no error occurred with respect to the *Forfeiture Order*’s consideration and rejection of Emmis’s arguments that our actions in this proceeding violated the Administrative Procedure Act. Emmis is simply wrong that the *Forfeiture Order* shifted the burden of proof. As the *Forfeiture Order* explained at paragraph 12, the complainant supplied evidence that Emmis repeatedly broadcast indecent material outside of the safe harbor established by 47 C.F.R. § 73.3999. Emmis, on the other hand, supplied no evidence whatsoever. Having

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<sup>3</sup> *Citicasters Co. (KEGL(FM))*, 16 FCC Rcd 7546 (Enf. Bur. 2001); *Citicasters Co. (KSJO(FM))*, 15 FCC Rcd 19095, 19096 (Enf. Bur. 2000); *Regent Licensee of Flagstaff, Inc. (KZGL(FM))*, 15 FCC Rcd 17286 (Enf. Bur. 2000).

failed to supply any evidence, Emmis cannot now reasonably complain that the *Forfeiture Order* improperly shifted any burden or violated the Administrative Procedure Act. Likewise, Emmis is wrong that the *Forfeiture Order* effectively imposes a rule that, in order to contradict complaints such as those in this proceeding, a broadcast licensee must retain a tape or transcript. In cases where there are disagreements as to whether certain material was actually broadcast and the conflicting contentions are supported by evidence of equivalent value, the Commission will deny an indecency complaint. *See Mr. Steve Bridges*, 9 FCC Rcd 1681 (Mass Med. Bur. 1994). However, where, like here, the licensee does not or cannot counter a complainant's allegations, and those allegations, standing alone, are sufficient to support a finding of an indecency violation, we will not hesitate to impose an appropriate sanction.<sup>4</sup>

7. Finally, we reject Emmis's argument that our action exceeded the scope of the authority delegated to the Enforcement Bureau by 47 C.F.R. § 0.311(a)(3). The legal question before us is not novel. Both the staff and the Commission have repeatedly addressed what constitutes broadcast indecency. *See generally Indecency Policy Statement, supra*. Moreover, there is no factual dispute as to what Emmis broadcast on Station WKQX(FM) and when it did so. Rather, the issue is whether the evidence before us is sufficient to support our conclusion that Emmis broadcast indecent material. For the reasons specified in the *Forfeiture Order*, which we reaffirm here, we conclude that the evidence is sufficient. We imposed liability only after considering what the licensee broadcast, when the broadcasts occurred, and their contexts. *See Indecency Policy Statement*, 16 FCC Rcd at 8003. Such action is within the scope of authority delegated to the Bureau. *See Indecency Policy Statement*, 16 FCC Rcd at 8015-16.

8. Accordingly, IT IS ORDERED THAT, pursuant to 47 U.S.C. § 1.106, Emmis Radio License Corporation's petition for reconsideration IS DENIED.

9. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482, within thirty (30) days of the release of this Order. *See* 47 C.F.R. § 1.80(h). The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above, and also should note the NAL/Acct. No. referenced above. If the forfeiture is not paid within that time, the case may be referred to the Department of Justice for collection pursuant to 47 U.S.C. § 504(a).

10. IT IS FURTHER ORDERED THAT a copy of this Order shall be sent by Certified Mail Return Receipt Requested to Emmis Radio License Corporation, c/o Doyle L. Rose, President, Emmis Radio, 15821 Ventura Blvd., Suite 685, Encino, California

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<sup>4</sup> *See Community Broadcasters, Inc.*, 55 FCC 2d 28, 35 (1975). *See also Infinity Broadcasting Corporation of Los Angeles (KROQ-FM)*, 17 FCC Rcd 9892, 9896 ¶ 18 (2002) (applying *Community Broadcasters, Inc.* in the indecency context).

91436-29155; with a copy to John E. Fiorini, III, Esq., Wiley, Rein & Fielding, 1776 K Street, N.W., Washington, D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau